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UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

REGION 32

TESLA, INC.,

Respondent,

and

MICHAEL SANCHEZ, an Individual,

Charging Party,

and

JONATHAN GALESCU, an Individual,

Charging Party,

and

RICHARD ORTIZ, an Individual,

Charging Party,

and

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL WORKERS OF AMERICA, AFL-CIO,

Charging Party.

Case Nos. **32-CA-197020**
32-CA-197058
32-CA-197091
32-CA-197197
32-CA-200530
32-CA-208614
32-CA-210879
32-CA-220777

CHARGING PARTY'S OPPOSITION TO RESPONDENT'S MOTION FOR SUMMARY JUDGMENT

I. Introduction.

Charging Party International Union, United Automobile, Aerospace, and Agricultural Implement Workers of America ("UAW" or "Charging Party"), opposes Respondent Tesla, Inc.'s ("Tesla" or "Respondent") frivolous Motion for Summary Judgment on the allegations made in Case 32-CA-220777. The Motion is procedurally improper, relies on disputed and unauthenticated evidence, and employs an entire affirmative defense constructed on a misrepresentation of UAW policy. The Board should dismiss this Motion and allow the genuine issues of material facts be resolved through the hearing scheduled to resume this Monday, September 24, 2018.

II. Respondent's Motion Should be Denied Because it is Procedurally Improper.

The NLRB Rules and Regulations require the assigned Administrative Law Judge to rule on all motions made after the opening of the hearing. Specifically, Section 102.25 states, "[t]he Administrative Law Judge designated to conduct the hearing *will rule* on all motions after opening of the hearing." Section 102.25 (emphasis added). The only existing exception to this requirement is for motions filed after the Administrative Law Judge has issued a decision and the case is transferred to the jurisdiction of the Board. *See* Sections 102.45(a), 102.47.

On September 11, 2018, Administrative Law Judge Amita Tracy granted the General Counsel's Motion to Consolidate Case 32-CA-220777 with Case 32-Ca-197020, *et al.* The hearing in Case 32-CA-197020, *et al*, commenced on June 11, 2018, completed four days of hearing, then adjourned until this Monday, September 24, 2018, when the hearing will resume. Therefore, for Respondent's Motion for Summary Judgment in Case 32-CA-220777 to comply with section 102.25, Respondent must submit it to Judge Tracy. Because that did not happen, the Board must dismiss this motion.

III. Respondent's Motion Should Be Denied Because Genuine Issues of Material Fact Exist.

The Board will deny motions for summary judgment unless there is "no genuine issue as to any material fact" and "the moving party is entitled to judgment as a matter of law." *Security Walls, LLC,* 361 NLRB 348, 348 (2014) (quoting *Conoco Chemicals Co.*, 275 NLRB

39, 40 (1985)). Pursuant to Rule 102.24(b), an opposition to a motion for summary judgment need not be supported by affidavits or other documentary evidence in order to demonstrate a genuine issue for hearing exists. Instead, the Board may deny the motion where the opposing party's "pleadings, opposition, and/or response indicate on their face that a genuine issue may exist." NLRB Rules and Regulations Section 102.24(b). The Board can also deny the motion when the motion itself fails to establish the absence of a genuine issue. *Id.*

A. Respondent's Motion Relies on Unauthenticated, Unsworn Evidence That Raises Genuine Issues of Material Fact.

A genuine issue of material fact exists, preventing summary judgment, because the Respondent relies on unauthenticated, unsworn testimony to establish its defense. Board proceedings do not provide for discovery procedures, and parties to such proceedings do not possess rights to pretrial discovery. *Bashas', Inc.*, 352 NLRB 661 (2008); see also *Beta Steel Corp.*, 326 NLRB 1267, 1267 n. 3 (1998). Parties have no right to depositions, requests for admissions, or interrogatories. *Kentucky River Medical Center*, 352 NLRB 194, 199 (2008). Therefore, unlike a Motion for Summary Judgment under Federal Rules of Civil Procedure Rule 56, the Parties in this case have had no opportunity prior to hearing to examine factual issues, and possibly resolve them, through sworn depositions or verified discovery responses.

Respondent's reliance on the Declaration of Rachelle Toletti, filed concurrently with Respondent's Motion for Summary Judgment, thus raises genuine issues of material facts, because none of the purported evidence has been authenticated, verified by a party, or sworn under oath. Neither the General Counsel nor the Charging Party have had an opportunity to question Ms. Toletti under oath regarding how she obtained the documents attached as Exhibits 1 through 4, or how she determined that Tesla Chief Executive Officer Elon Musk's ("CEO Musk") Twitter account is a "personal" account. (Toletti Decl. ¶ 9) Because the evidence is unauthenticated, unsworn, and has not been subjected to questioning by opposing parties, it is not free from genuine issues of material facts. Thus the Board should reject this motion.

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B. The Respondent's Proffered Defense of CEO Musk's Twitter Statement Raises Genuine Issues Of Material Facts.

The General Counsel's Complaint alleges that CEO Musk issued a statement through Twitter (also called a "Tweet") on May 20, 2018 that violated Section 8(a)(1) of the National Relations Act. In its Motion for Summary Judgment, Tesla contends Musk's statement is lawful "in light of his and Tesla's subsequent clarifications" and cites case law stating that the alleged threats must "be considered in the context of the factual background in which they were made." (MSJ at 9, 10) But the factual circumstances of the May 20, 2018 remain mostly uncovered, as Tesla only presents its preferred facts. Genuine issues of material facts exist regarding the scope of the proper context of CEO Musk's May 20, 2018 statement. Additional context, which Charging Party has not had the opportunity to put into the record, includes but is not limited to the circumstances surrounding the Tweet, who read the Tweet, its coverage in media reports, and its relationship to Charging Party's organizing drive.

Respondent goes on to argue that the additional context provided by Exhibit 2, Exhibit 4, and a press release described in paragraph 9 of Ms. Toletti's Declaration demonstrates that CEO Musk's May 20, 2018 statement was a reasonable prediction of the consequences of unionization, outside of Tesla's control. (MSJ, at 10, 11) The Supreme Court long ago drew a line distinguishing between threats of reprisals that violate Section 8(a)(1) and employer free speech that lawfully predicts the effects of unionization. *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618 (1969). For a prediction to be lawful, the effects of unionization must be "carefully" stated "on the basis of objective fact" and involve "probable consequences beyond [the employer's] control." *Id.; DHL Express, Inc.*, 355 NLRB 1399, 1400 (2010).

Respondent contends that CEO Musk was referring to an alleged UAW policy that prohibits stock options as part of represented employees' compensation package. (MSJ at 11) Tesla's only evidentiary basis for this extraordinary assertion is Tesla's own press release and CEO Musk's two Tweets. (Toletti Decl. ¶ 9, Exs. 2 & 4) Respondent thus attempts to argue that the Board should dismiss the Complaint because its CEO's statement was a "lawful prediction of

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future consequences," yet somehow denies there is any factual dispute about whether the statement was a reasonable prediction of future consequences.

In reality, Respondent's allegation is not just disputed, it is plain wrong. The UAW does not have a policy preventing UAW-represented employees from owning stock options. In fact, the UAW has existing collective bargaining agreements that include Employee Stock Ownership Plans.[1] Pursuant to Rule 102.24(b), this representation is sufficient to establish a genuine issue of material fact regarding whether UAW permits stock options.[2] Because Respondent's Motion relies on this disputed fact to argue CEO Musk's Twitter statement was a lawful prediction, the Motion must be denied.

C. Respondent's Motion Relies on Additional Factual Allegations that Raise Genuine Issues of Material Facts.

Respondent's Motion also relies on several other factual allegations, which may raise genuine issues of material facts. While Charging Party does not concede that these facts are relevant or necessary to establish that CEO Musk's May 20, 2018 statement violated the Act, it nonetheless brings these disputes to the Board's attention because Respondent has made them an issue in this case by relying on them in its Motion.

In her declaration, Ms. Toletti asserts that "Mr. Musk maintains a personal account on the social media website Twitter (@elonmusk), which is separate and distinct from Tesla's official twitter account..." (Toletti Decl. ¶ 3) Respondent relies on this assertion throughout the Motion. (MSJ at 3, 9, 16) While Charging Party does not concede there is any legal significance to distinguishing between a "personal" Twitter account of CEO Musk and an "official" Twitter account of Respondent, making such a distinction would be highly fact dependent. For example, contrary to Toletti's assertion that the account is "personal," CEO Musk uses his @elonmusk

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[1] Further, the UAW has negotiated successful profit-sharing programs for UAW bargaining unit members at General Motors, Ford, and Chrysler. For example, UAW bargaining unit members at General Motors received profit sharing checks of $11,750 and $12,000 the past two years.

[2] While not required under the NLRB's Rule & Regulations, Section 102.24(b), Charging Party can provide affidavits or other documentary evidence to support this fact if the Board desires it.

account on Twitter to make statements on behalf of Tesla. In addition, a genuine issue may exist regarding whether the @elonmusk account is objectively perceived as an "official" Twitter account of Respondent.

Respondent's Motion repeatedly alleges that CEO Musk's statement was not "directed to" employees. (MSJ at 16, 18, 23) Once again, while Charging Party does not concede that this fact is relevant or necessary to establish the General Counsel's allegations, Charging Party disputes the truth of the allegation. The statement was actually a direct appeal by CEO Musk to Tesla employees on why they are better off without a union, which Tesla employees received and discussed.

Respondent also alleges in its Motion that the Tweet was "transmitted outside the workplace," then relies on this assertion. (MSJ at 16, 20) While Charging Party does not concede the relevance of this assertion to the General Counsel's allegations, a genuine issue may exist regarding its truth. Respondent provides no evidence of CEO Musk's location at the time of the Tweet; instead, the alleged fact is merely asserted by Tesla's counsel in the body of its motion. Based on media reports, a genuine issue of fact may exist regarding CEO Musk's location at the time of the Tweet.

Finally, Respondent alleges that the "vast majority of readers [of CEO Musk's Twitter statement] are persons not protected by the Act." (MSJ at 11, 12, 13) While Charging Party does not concede relevance, Respondent again has relied on a disputed fact to argue its Motion. Respondent submits no evidence regarding who the readers of the May 20, 2018 Twitter statement were, let alone what percentage of them were Tesla employees. Because there is no actual evidence to support this statement, a genuine issue of fact may exist.

D. Respondent's 1st Amendment Argument Must Fail Because It Relies on Disputed Facts.

Respondent's 1st Amendment argument must fail because it relies on many of the same genuine issues of material facts discussed above. Tesla alleges its CEO's May 20, 2018 statement was made "outside the workplace" and was "not directed to any employee of Tesla," but these facts are disputed. (MSJ at 16) Respondent further argues in support of their 1st

Amendment argument that the statement was "ambiguous" and "innocuous." *Id.* Such characterizations raise genuine issues of material facts because they require an examination of the factual circumstances surrounding CEO Musk's statement.

In addition, the Supreme Court's decision in *NLRB v. Gissel Packing Co.*, conclusively rebuts the Respondent's extended 1st Amendment arguments. 395 U.S. 575 (1969). In *Gissel*, the Court stated that if "any indication" exists that an employer may take an action "solely on his own initiative" and "for reasons unrelated to economic necessities," then the statement:

> is no longer a reasonable prediction based on available facts but a threat of retaliation based on misrepresentation and coercion, and *as such without the protection of the First Amendment.*

Gissel, 395 U.S. at 618 (emphasis added). Thus, there is no conflict between the NLRA and the 1st Amendment.

As described above, a genuine issue of material facts exists regarding whether CEO Musk's May 20, 2018 statement is "a reasonable prediction based on available facts" or "a threat of retaliation based on misrepresentation and coercion." Because threats of retaliation do not have 1st Amendment protection, the Board must deny Respondent's Motion for Summary Judgment and allow a hearing to resolve these factual disputes.

IV. Conclusion

For the above reasons, Charging Party urges the Board to dismiss Respondent Tesla's Motion for Summary Judgment pertaining to the allegations in Case 32-CA-220777.

DATED: September 18, 2018

Respectfully submitted,

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PROOF OF SERVICE BY ELECTRONIC MAIL

Case No. 32-CA-197020 et al.

RENEE CARNES certifies as follows:

I am employed in the County of Los Angeles, State of California; I am over the age of eighteen years and am not a party to this action; my business address is 6300 Wilshire Boulevard, Suite 2000, Los Angeles, California 90048-5202. My electronic notification address is rac@ssdslaw.com

On September 18, 2018, I caused the foregoing document(s) described as: **CHARGING PARTY'S OPPOSITION TO RESPONDENT'S MOTION FOR SUMMARY JUDGMENT** be served by electronic mail upon the person(s) shown below,

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__X__ **BY E-MAIL:** By transmitting a copy of the above-described document(s) via e-mail to the individual(s) set forth above at the e-mail addressed indicated.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on September 18, 2018, at Los Angeles, California.

RENEE CARNES